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NEGLIGENCE OF PAYEE AS A DEFENSE TO BANK PAYING CHECK ON FORGED INDORSEMENT.—It seems obvious that in the ordinary action upon contract for failure to deliver goods, it would be no defense, in the absence of estoppel, that the plaintiff knew the goods had been stolen and had failed to give notice of the theft[1] to the defendant within a reasonable time. Likewise if a thief steals the plaintiff's chattels and sells them to an innocent purchaser, in an action by the plaintiff for the conversion, it would be no defense to aver that after discovering the theft, the plaintiff did not give notice thereof to the purchaser within a reasonable time.[2] But in the analogous situation which was presented in the recent case of *Annett* v. *Chase National Bank* (1st Dept. 1921) 196 App. Div. 632, 188 N. Y. Supp. 7, a different rule was said to apply. In that case, the plaintiff was the payee of a draft on the defendant bank. The plaintiff's attorney forged the indorsement and upon this forged indorsement, the bank paid the draft. The attorney converted the proceeds to his own use. The plaintiff, having learned of the forgery, delayed two months before notifying the defendant bank thereof. This was an action for the conversion of the draft. Judgment on a verdict for the plaintiff was reversed on appeal, on the ground that the failure to give notice was negligence as a matter of law which barred the plaintiff from recovering, although there was no proof that such delay had actually caused any loss to the defendant.[3]

Leather Manufacturers' Bank v. *Morgan*[4] was the leading case cited in support of this doctrine. That was an action by a despositor to recover sums paid out on raised checks. The plaintiff had received bank statements and failed to examine them. The court held that custom and usage in the banking business had imposed upon a depositor the duty of diligently examining bank statements;[5] that the silence of the depositor was equivalent to a representation that the statements were correct;[6] that if the bank in reliance upon this representation failed to take steps against the criminal, the depositor was thereby estopped from setting up that the statements were incorrect.[7] And the court qualified this by

[1] While there may be a duty to inform the proper public officer of the commission of a felony, this duty would give rise to no civil rights in the victim of the felony.

[2] But no recovery in conversion may be had against an innocent purchaser in New York until demand and refusal. *Tompkins* v. *Fonda Glove Co.* (1907) 188 N. Y. 261, 80 N. E. 933 (*semble*).

[3] Of course, if the owner was not negligent, a bank is liable for money paid on a forged instrument whether it was negligent, *Louisville, etc. Ry.* v. *Citizens' etc. Bank* (1917) 74 Fla. 385, 77 So. 104, or not. *Robinson* v. *Chemical Nat'l Bank* (1881) 86 N. Y. 404.

[4] (1886) 117 U. S. 96, 6 Sup. Ct. 657.

[5] See *National Dredging Co.* v. *Farmers' Bank* (Del. 1908) 6 Penn. 580, 589, 69 Atl. 607; *Bank* v. *Richmond El. Co.* (1907) 106 Va. 347, 350, 56 S. E. 152. But the depositor is under no duty to verify indorsements. *Los Angeles Investment Co.* v. *Home Sav. Bank* (1919) 180 Cal. 601, 182 Pac. 293; *Metallurgical Securities Co.* v *Mechanics etc. Nat'l Bank* (1916) 171 App. Div. 321, 157 N. Y. Supp. 321. And the depositor is under no duty to call for a pass book left by him to be balanced. *McCarty* v. *First Nat'l Bank etc.* (1920) 204 Ala. 424, 85 So. 754.

[6] See *National Dredging Co.* v. *Farmers' Bank, supra,* footnote 5, p. 589.

[7] Some cases, including those in the federal courts, have announced the rule that the negligence of a depositor is not a defense unless it amounts to an estoppel or is the proximate cause of the forgeries. *United States* v. *National Bank of Commerce, etc.* (C. C. A. 1913) 205 Fed. 433; *New York, etc. Bank* v. *Houston* (C. C. A. 1909) 169 Fed. 785; *Jordan Marsh Co.* v. *National Shawmut Bank* (1909) 201 Mass. 397, 87 N. E. 740. This is the rule which would be expected by analogy to the cases not involving banks. Also *cf. Hammerschlag Mfg. Co.* v. *Importers' etc. Bank* (C. C. A. 1919) 262 Fed. 266, where the plaintiff depositor was held bound by the bank's stipulations limiting liability for forgeries not reported within a specified time after the return of vouchers. But see cases *infra,* footnotes 12, 13 and 14.

stating[8] what seems to be the law in New York and generally, that if the bank was negligent[9] in failing to detect the alterations, the negligence of the depositor would be immaterial.[10] There is a vital difference, however, between this case and the instant case. In the instant case, the plaintiff was a stranger to the bank. He never made any representation to the bank. His liability here, if any, would seem to rest upon a different principle. Yet the courts fail to recognize this. They treat the two cases precisely the same. Granting the correctness of this, however, yet the instant case neglected to consider the question whether or not the bank was negligent, apparently assuming it to be immaterial.[11]

In the depositor cases, if the plaintiff's negligence contributed to the bank's deception, then if the bank used due care, there can be no recovery against it.[12] The New York courts follow this rule by holding that negligent failure to detect and give notice is a defense as to forgeries perpetrated subsequent to the plaintiff's default in inspecting prior statements evidencing forgery.[13] But here they stop, in contrast to *Leather Manufacturers' Bank* v. *Morgan,* and allow a recovery as to forgeries perpetrated prior to the first moment when, through failure to examine his statements, the plaintiff became negligent.[14] If this be the rule with regard to a depositor who is in so close a business relationship with the bank, much more so, seemingly, would it be the rule as to comparative strangers like the payee in the instant case from whom a duty of detection or disclosure would less justly be exacted. In this respect also then, the instant case seems at variance with previous New York decisions, for the plaintiff here was in no way negligent until after the bank had paid the forged draft.[15]

The reasoning of the Pennsylvania courts inclines toward supporting the instant case.[16] Its justification is there found in the fact that delay may deprive

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[8] *Leather Manufacturers' Bank* v. *Morgan, supra,* footnote 4, p. 112.

[9] A bank is under a duty not to pay without identification of the payee or indorsee. *Citizens' Nat'l Bank* v. *Reynolds* (Ind. 1920) 126 N. E. 234; *Jordan Marsh Co.* v. *National Shawmut Bank, supra,* footnote 7. But a liability incurred by a breach of this duty may be extinguished if the depositor was negligent and the bank used due care. *Leather Manufacturers' Bank* v. *Morgan, supra,* footnote 4.

[10] *First Nat'l Bank* v. *Farrell* (C. C. A. 1921) 272 Fed. 371; *National Dredging Co.* v. *Farmers' Bank, supra,* footnote 5; *Critten* v. *Chemical Nat'l Bank* (1902) 171 N. Y. 219, 63 N. E. 969; *New York etc. Bank* v. *Houston, supra,* footnote 7; see *Bank* v. *Richmond El. Co., supra,* footnote 5; *Brixen* v. *Deseret Nat'l Bank* (1888) 5 Utah 504, 513, 18 Pac. 43.

[11] This was plainly erroneous by analogy to the depositor cases. *Supra,* footnotes 7 and 9. However a bank may escape liability by establishing that it was not negligent but that the depositor was. *Prudential Ins. Co.* v. *National Bank of Commerce* (1920) 227 N. Y. 510, 125 N. E. 824.

[12] *Weisberger Co.* v. *Savings Bank* (1911) 84 Ohio St. 21, 95 N. E. 379; *First Nat'l Bank etc.* v. *Walling & Son* (Tex. Civ. App. 1920) 218 S. W. 1080.

[13] *Critten* v *Chemical Nat'l Bank, supra,* footnote 10; *Morgan* v. *United States Mortgage etc. Co.* (1913) 208 N. Y. 218, 101 N. E. 871.

[14] *Critten* v. *Chemical Nat'l Bank, supra,* footnote 10. The same distinction was made in *National Dredging Co.* v. *Farmers' Bank, supra,* footnote 5; *contra, Leather Manufacturers' Bank* v. *Morgan, supra,* footnote 4.

[15] N. I. L. (N. Y. Cons. Laws 1909) § 326 provides that no bank shall be liable for cashing forged checks unless the depositor gives notice of the forgery within one year after the return of the vouchers to him. But that statute does not apply to the situation in the instant case.

[16] *Marks* v. *Anchor Savings Bank* (1916) 252 Pa. St. 304, 97 Atl. 399 (payee of certified check); *Connors* v. *The Old Forge Bank* (1914) 245 Pa. St. 97, 91 Atl. 210; *McNeeley* v. *Bank of North America* (1908) 221 Pa. St. 588, 70 Atl. 891. The last two cases, both depositor cases, were relied upon in the instant case, together with *Leather Manufacturers' Bank* v. *Morgan, supra,* footnote 4, and *United States* v. *National Exchange Bank* (D. C. 1891) 45 Fed. 163. In this case "there was little consideration of the case of delay without resulting dam-

the bank of an opportunity to go against the forger and may allow a dishonest depositor or payee to aid the forger to escape.[17] A similar argument, however, would have equal force in the case already mentioned where an innocent purchaser of a stolen chattel is sued in conversion. Yet the rule which would be followed, it is submitted, would be quite the contrary of that here laid down.

Whatever in such cases be the theory of the courts in placing a liability upon the plaintiff to have his claim against the bank defeated by his subsequent negligence, the weight of authority in the United States including New York allows no such result without proof of damage to the bank.[18] Yet slight proof of injury is often sufficient.[19]

The instant case goes further than the depositor cases, for here no representation was made upon which the bank would be justified in acting. This extension of settled legal principles cannot be justified upon analogy, but if at all, only upon the ground of the present day commercial needs for expeditious banking methods.[20] Furthermore, the instant case by anology seems at variance with three settled rules as laid down in previous New York cases. First, if the bank is negligent the negligence of the depositor is immaterial.[21] Second, if the bank suffered no loss the negligence of the depositor is immaterial.[22] Third, in any event the bank is liable to a depositor for paying forged instruments when at the time the payments were made, the depositor had violated no duty which it owed to the bank.[23]

THE MEASURE OF RESTITUTION IN RESCISSION FOR DEFAULT.—"Now where a contract is to be rescinded at all it must be rescinded in toto and the parties put in statu quo." [1] Unfortunately *"non tamen irritum quodcumque retrost efficiet, neque diffinget infectumque reddet quod fugiens semel hova vexit."* [2] This restoration is impossible of literal fulfillment. Hence it is not surprising that the faithful reiteration of the doctrine by the American courts which nevertheless view with favor the rescission remedy, has rendered the *status quo* concept truly Protean.[3]

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age . . . " *United States* v. *National Exchange Bank of Boston* (D. C. 1905) 141 Fed. 209, 211. No other authorities were cited in the instant case. Even in Pennsylvania, however, no case has been found which justifies the extreme position of the instant case.

[17] See *McNeely* v. *Bank of North America, supra,* footnote 15, pp. 594, 595.

[18] *Houseman Spitzley Corp.* v. *American State Bank* (1919) 205 Mich. 268, 171 N. W. 543; *Kearny* v. *Metropolitan Trust Co.* (1905) 110 App. Div. 236, 97 N. Y. Supp. 274, aff'd (1906) 186 N. Y. 611, 79 N. E. 118; *Murphy* v. *Metropolitan Nat'l Bank* (1906) 191 Mass. 159, 77 N. E. 693; *Janin* v. *London, etc. Bank* (1891) 92 Cal. 14, 27 Pac. 1100; *Wind* v. *Fifth Nat'l Bank* (1890) 39 Mo. App. 72; *Pratt* v. *Union Nat'l Bank* (1909) 79 N. J. L. 117, 75 Atl. 313, *aff'd* (1911) 81 N. J. L. 588, 80 Atl. 492; *Hardy & Bros.* v. *Chesapeake Bank* (1879) 51 Md. 562; *cf. First Nat'l Bank etc.* v. *Allen* (1893) 100 Ala. 476, 14 So. 335; but *cf. Israel* v. *State Nat'l Bank, etc.* (1909) 124 La. 885, 50 So. 783.

[19] *Cf. Leather Manufacturers' Bank* v. *Morgan, supra,* footnote 4.

[20] Whether or not the facts in the instant case warranted a finding of ratification is another question. This note has attempted only a discussion of the ground taken by the court.

[21] *Critten* v. *Chemical Nat'l Bank, supra,* footnote 10.

[22] *Kearny* v. *Metropolitan Trust Co. supra,* footnote 17; *Metallurgical Securities Co.* v. *M. & M. Securities Co., supra,* footnote 5.

[23] *Critten* v. *Chemical Nat'l Bank, supra,* footnote 10.

[1] Lord Ellenborough, *C. J.,* in *Hunt* v. *Silk* (1804) 5 East 449, 452, where because the parties could not be put in *statu quo,* a lessee was not permitted to rescind and recover rent paid, although the lessor had defaulted materially. And in *Couch* v. *Crane* (1914) 142 Ga. 22, 27, 82 S. E. 459, "Rescission involves restoration to the original status . . . "; see Story, *Contracts* (5th ed. 1884) § 1337.

[2] Horace, Bk. III, *Ode* XXIX.

[3] *Hunt* v. *Silk, supra,* footnote 1, represents the English view, which has the virtues of logic and comparative simplicity of application. *Cf. Masson* v. *Bovet*